No. 14731

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AVALO ALLISON FISHER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Whether the materiality of the false statements appellant was charged with having made was adequately alleged in the indictment, and whether in any event any prejudice arose or now appears from any technical deficiency in the indictment in this respect.

2. Whether the second and fourth counts of the indictment were too vague to support a conviction

thereunder because they charged that appellant was "affiliated" with the Communist Party, without defining the term or setting forth the acts which constituted such affiliation.

3. Whether it was proper to allege the false statement on membership in one count and the false satement on affiliation in another count when both statements were contained in the same affidavit.

4. Whether the trial court properly admitted the testimony of the witness Harper regarding appellant's Communist Party membership prior to the dates of the affidavits.

5. Whether the ruling of the trial court which permitted the witness Harper to explain his answer to a question was proper.

6. Whether the trial court properly excluded—

(a) evidence offered as impeachment evidence which was merely cumulative of evidence already introduced;

(b) the testimony of the prosecutor which was offered as impeachment evidence on the basis of an alleged prior inconsistent statement by the witness Harper when there was no evidence of any prior inconsistent statement;

(c) evidence of former testimony of the witness Harper, offered as impeachment evidence, on a collateral matter having no bearing on any material issue of this case.

7. Whether the trial judge properly refused to give the "two-witness" perjury instruction, in view of the facts that (1) this was not a prosecution for perjury but for making "false statements," (2) the non-Communist affidavit provision of the pertinent statute specifically directs that prosecution for false statements be brought under the "false statements" statute, and (3) the gist of the offense is not the false swearing but the filing of the false affidavit with the National Labor Relations Board.

8. Whether the trial judge gave an adequate cautionary instruction relative to the weight to be accorded the testimony of those government witnesses, former members of the Communist Party, who were receiving money from the Government while testifying.

9. Whether the instructions of the trial judge on the definition of the terms "membership" and "affiliation" were sufficient to guide the jury in determining whether appellant was a member and/or affiliated with the Communist Party on the dates on which he filed the affidavits.

10. Whether, in a prosecution for falsely denying (a) membership in the Communist Party and (b) affiliation with the Communist Party, the evidence is sufficient to sustain the verdict of guilty, where several witnesses testified to Communist activities of the appellant both before and after the dates of the signing of the affidavits.

COUNTERSTATEMENT OF THE CASE

The Government believes a counterstatement of the case is necessary since the appellant fails to state much of the evidence with which the Government proved its case. In addition, appellant urges the same interpretation of the evidence which he urged to the jury below, and which it rejected.

This appeal is from the conviction of appellant on four counts of a six count indictment (R. 69, 73, 879-880) (A. 69-73)[1] for the violation of 18 U.S.C. Section 1001, all counts charging that appellant made false statements to a Government agency, the National Labor Relations Board, in a matter within that Board's jurisdiction in three Affidavit[s] of non-Communist Union Officers (NRLB Form 1081)[2] which he filed with that agency on June 29, 1951, July 11,

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[1] "A" will be used herein to refer to Appellant's Brief; "R" will refer to the Official Transcript of the Court Reporter; and "Ex." will refer to Government Exhibits.

[2] NLRB Form 1081 reads as follows:

The undersigned being duly sworn, deposes and says:

(1) I am a responsible officer of union named below.

(2) I am not a member of the Communist Party or affiliated with such Party.

(3) I do not believe in, and I am not a member of nor do I support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

1952, and June 3, 1953 pursuant to the provisions of Title 29 U.S.C. Section 159(h). Specifically, the indictment charged in Counts I, III, and V, that appellant falsely stated he was not then a member of the Communist Party, and in Counts II, IV, VI, that he was not then affiliated with the Communist Party.

The indictment under which the appellant was convicted was returned on June 22, 1954. The first prosecution witness was called on November 23, 1954, and the Government rested its case on November 30, 1954. Appellant's motion for a judgment of acquittal was denied on December 1, 1954 (R. 690-691). Appellant called his first witness on December 1, 1954 and rested his case on December 1, 1954. Appellant did not testify. The jury verdict of guilty on Counts I, II, III and IV and not guilty on Counts V and VI was returned on December 2, 1954 (R. 879-880). Counts V and VI were based on appellant's 1953 non-Communist affidavit. Defense motions in Arrest of Judgment and Motion for Judgment of Acquittal, or in the alternative for a New Trial were denied (A. 4) and sentence was imposed on January 10, 1955. The sentence was imprisonment for five years on each of the remaining four counts, the sentences to run concurrently (A. 3).

I. *The Execution and Filing of the Non-Communist Affidavit by Appellant*

That part of the Government's case which is concerned with the execution and filing of the non-Com-

munist affidavits by the appellant is not in issue. Appellant does not contend that the Government failed to properly prove the execution and filing of the non-Communist affidavits by him. Nor does he contend that the non-Communist affidavits were improperly admitted in evidence (R. 22-23).

II. *Appellants Communist Party Activities:*

Two Government witnesses, identified the appellant at a District Committee Meeting held for Communist Party Officers on January 1, 1949 (R. 107, 409-410, 439). Uncontested evidence shows that appellant paid Party dues in 1950 (R. 110) while he was obligated to execute an affidavit of a Non-Communist Union Officer (R. 111, 613, 614).[3] There is no challenge to the testimony that appellant was designated in 1952 by a Party leader to administer organizational direction and to revive lagging Communist activity and dues collection in the Everett Section of the Communist Party (R. 121-122). In a meeting held in December 1952 appellant directed the distribution of Party literature, of unquestioned authenticity, that not only delineated a program for future Party meetings and a reading list of Communist Party classics and periodicals for the membership, but also challenged the "attacks" upon the Communist Party

[3] Appellant was indicted on June 22, 1954, at which time the Statute of Limitations had expired, for the 1950 filing.

by "the monopolists [who] are attempting to destroy it" (R. 119, 122-123, 126-131, 136-137; Ex. Nos. 7 and 8). The record, as established by two witnesses, not only lists the meetings appellant attended in 1952 (R. 115, 131-133, 616) and shows that he had the power to designate the meeting time and place of a Communist Party meeting in 1953, (R. 137-139), but the evidence demonstrates appellant's continued allegiance to the Communist Party in May 1953 as expressed by his growing concern with those "stool pigeons" who were exposing its activities (R. 140-143, 616-618).

Government witness Clark M. Harper joined the Communist Party in Seattle in 1943 (R. 357). He became an active member in 1944, at the request of the Federal Bureau of Investigation (R. 359-360). Harper terminated his Party membership when he testified as a Government witness in a Smith Act trial on June 17, 1953, *United States v. Henry P. Huff, John Daschbach, et al* (R. 361). During the period of his activity he attended over 1000 Communist Party meetings (R. 361-362, 429). He rose in the Party hierarchy to hold positions as a member of the District Committee of the 12th District of the Communist Party in the State of Washington, from 1947 to December 1950 (R. 362, 376); and he was a Regional Party Organizer from 1950 to 1953 (R. 362, 376).

Harper described the District Committee as the body that transmitted the policies of the National Committee of the Communist Party to the lower eche-

lons in the Communist scale. He stated that Enlarged District Committee Meetings were concerned with topics of a political nature relating to Marxism and Leninism, the policies, strategies and tactics of the Communist Party, as well as a number of educational and political subjects dealing with current programs that the membership would implement (R. 375-376). To facilitate the dissemination of Party doctrine when a matter of special urgency arose, the Committee would invite the subordinate leadership functionaries, comprised of Club Chairmen and secretaries to what were termed, Enlarged District Committee Meetings (R. 377-378). Harper testified that a position as a Club functionary presupposed membership in the Communist Party, (R. 379) and two Government witnesses, Harper and Harley Mores, stated that only Communist Party members were admitted to Enlarged District Committee meetings (R. 108, 410).

The sanctity of Enlarged District Committee meetings was so carefully preserved that the conference rooms were checked for hidden microphones, the door guarded by Communist Party leaders (R. 109), and the chief of each delegation present was charged with making certain that none but Party members were in his group (R. 462). It was at such a meeting that witnesses Harper and Mores identified appellant at the Frye Hotel in Seattle on January 1, 1949 (R. 107, 409-410, 435).

Harper testified that the January 1st meeting

was held for special Communist Party Officers (R. 439) and that it was an important occasion (R. 441-442) heralding the return to the Seattle area of the District Committee Chairman, Mr. Huff (R. 373, 409). He recalled that it was held on an unprecedented date, the only such departure in all his experience in the Party (R. 451, 566). The meeting began at 9:00 or 9:30 and continued throughout the day (R. 437). Huff addressed the group (R. 409) and witness testified that the discussion of that meeting concerned a picket line that was to be strung about the County Court House and would be led by Mr. Daschbach (R. 409).

Harley Mores testified that he first joined the Communist Party in 1934 or 1935 (R. 92-93, 177) at Sultan, Washington (R. 178). Witness left the Party in 1936 or 1937 (R. 211) and rejoined again at the request of the Federal Bureau of Investigation (R. 95-96). He remained in the Party until May 17 or 19, 1953 when he testified for the Government at the Seattle Smith Act trial (R. 93). Mores has been a member of the Sultan Club and the Everett Club of the Communist Party (R. 106); he has been Chairman of the Gold Bar Club of the Communist Party (R. 97, 106); a Section organizer of the Communist Party in the Sultan, Washington area (R. 97); and was a member of the Regional Board of the Communist Party in Everett (R. 97). Mores stated that in these capacities he had attended conventions and Enlarged District Committee meetings of the Communist Party, in

Seattle, at which he identified appellant (R. 106).

Mores has known appellant since 1947 (R. 102) and was a member of Sultan Local 93 of the International Woodworkers of America (R. 92). Appellant served on the Executive Board of Local 93 in 1950 and continued in that capacity for three years (R. 17, 105). Mores first identified appellant as a member of the Communist Party in the Everett region (R. 102-103) on the basis of conversations he had held with appellant concerning Party policy and membership (R. 103). Mores had also collected Communist Party dues from the appellant (R. 103-110) and later in their relationship had deposited membership dues receipts with appellant (R. 103). Witness recounted that he had traveled in the company of appellant and other Party leaders when both were attending Party functions in Seattle (R. 109). The witness testified that he had accompanied appellant to Party meetings held in the area surrounding Gold Bar (R. 109) stating that "* * * there has been other leadership up there with him even before he became the leader there" (R. 109).

In September 1950 (R. 112) when appellant had visited Mores' home in Gold Bar, he paid $12.00 as Party dues to Mores (R. 110). At the same time, appellant sought Mores' advice regarding the Party policy as it related to the signing of a non-Communist affidavit (R. 110). Both Mores and his wife, Mazie Mores, testified that appellant explained that he had

been elected to the Executive Board of the Skykomish sublocal of the Sultan Branch IWA, and would be required to file the affidavit (R. 104-105, 614). This information coincided with the testimony of Government witness Vern Castle, Secretary-Treasurer and Business Agent of IWA Local 93 (R. 15-17). Since Mores was reluctant to advise appellant in this matter, he suggested that appellant settle his dilemma by consulting with "the leadership in Everett" (R. 111, 614, 621).

At this point, Clark Harper from his experience as a member of the District Committee which transmitted and implemented Party policy, (R. 375-376) detailed the security measures adopted by the Communist Party (R. 568-571). Harper testified that the indictment of the top Party leaders in 1948 and the problem of the non-Communist affidavits (R. 568, 570) had marked the initiation of a new Party security program. Prior to that period the membership was held to strict compliance with the tenets of the Party constitution requiring the periodic payment of dues and regular attendance at meetings (R. 382, 387, 570). But this policy was changed when it became apparent that these requirements would conflict with the obligation of union leaders to execute the non-Communist affidavits (R. 570). Therefore, to implement the Party policy of retaining labor officers within the organization (R. 383, 569) without exposing them to prosecution (R. 382-383), members were told to sign the affidavits and to discontinue their

attendance at meetings (R. 383, 569-570). However to insure continued control of the membership, Party meetings were now confined to specific contact persons who met within small groups (R. 387, 455-456, 561-570). As added precaution the Clubs were ordered to destroy the membership cards (R. 133-134, 456, 568, 570), to desist from listing or naming their members (R. 570), and to curb formal Party meetings (R. 570).

Both Mores and Harper testified to the implementation of these measures. Mores related that the Sultan Club was split into sub groups because of the security edict (R. 105-106). He told of the discontinuance of records and bookkeeping practices and stated that these smaller units facilitated remembering the financial transactions that were formerly recorded (R. 133). Harper stated that he had not seen appellant at meetings between 1949 and 1954 because the Communist Party went underground (R. 456). He testified that where members were formerly allowed to meet in groups of five persons (R. 569) they were later restricted to groups of three (R. 456, 570). So stringent was this protective cover that it was difficult to meet with anyone unless you were appointed his Party contact (R. 456). Even the Clubs were forbidden to disclose the composition of their membership to each other (R. 569).

Appellant abided by these security precautions (R. 114, 273, 275, 621) and reappeared on the Com-

munist Party scene just prior to December 26, 1952 (R. 121). He was present at the home of the Communist Party leader in Everett when Mores was summoned to meet with his superior (R. 121). Until that date Mores had submitted his dues collections to the Everett Communist Party leader (R. 121). But at this conference Mores was told by this Party leader that "* * * he was turning that area over to Mr. Fisher up there, and Mr. Fisher would collect the dues and try to organize — help organize up there. Things wasn't moving fast enough and he didn't have time to do it, and he figured Fisher was the man to do it." (R. 122). Then Mores testified, "I was to help Fisher, help collect, and turn dues over to him and receive my orders from him." (R. 122).

The new role was exercised soon afterward. Both Harley and Mazie Mores testified that on December 26, 1952 appellant was present at a Communist Party meeting held in Mores' home (R. 114-115, 616). The discussion at that meeting was confined to topics relating to the Communist Party (R. 115-116), and in this vein appellant stated that he had been delegated to assume further responsibility in that area and that he would initiate this assignment by organizing "* * * the woods, the Sultan Local" (R. 116).

At the December 26, 1952 meeting appellant's renascence in open Party activity was effected. On this occasion he supplied the witness, Mores, with Party literature that Mores was to distribute to the

membership (R. 117, 119, 120). While this marked the beginning of this phase of appellant's activity as it related to Mores (R. 118), it was a continuance of similar behavior begun on June 30, 1950. On that date, officers Charles James Odle and Thomas R. Durham of the Sumner Police Department had discovered appellant beside his car shortly before midnight (R. 77-78). The car and the ground around it was strewn with approximately 100 pamphlets, some bearing the title "Communism" and others relating to Marx (R. 75). This was just prior to the date that appellant was elected to the Executive Board of IWA Local 93 (R. 17) and before appellant sought advice from Mores regarding Party policy as it concerned the signing of the non-Communist affidavit (R. 110).

During December 1952 appellant delegated Mores to deliver the pamphlets to individuals in the Party (R. 122-123) who were to read them and pass them on to other members (R. 117-118, 136-137), and to take them to areas where they filled the gap left by the absence of a Club Chairman (R. 117). Mores stated, "I was instructed to give one more instruction on these papers, to just not lay them around where anyone could pick them up." (R. 138). The papers were also to be the basis for the discussion at a meeting that was to be held two weeks from the date of distribution (R. 137). Mores had no choice but to obey appellant's instructions or be expelled from the Party (R. 324), because, "That was the jobs of such guys as Fisher. You see, they had it, and I was

watched to see that I did it, and I did it." (R. 324).

The 1952 literature detailed a plea for Party registration and a reading list:

"A. On the Party.

1. Foster, HISTORY OF the C P U S A (last chapter).
2. Malenkov, October 1952 POLITICAL AFFAIRS (Report to 19th Congress, Section on The Party).
3. Foster, September, 1952, POLITICAL AFFAIRS (The Formation of the Communist Party 1919-1921).
4. Elmer Larson, October 1952, POLITICAL AFFAIRS (On Guard Against Enemy Infiltration).
5. Stalin, October, 1952, POLITICAL AFFAIRS (Speech at Nineteenth Congress).
6. Blake and Aptheker, September 1952, POLITICAL AFFAIRS (Flesh and Bone of the Working Class).

B. On Peace.

1. POLITICAL AFFAIRS, September, 1952, (Peace, Today's Critical Issue).
2. POLITICAL AFFAIRS, September, 1952 (On the Question of Sectarianism in Our Peace Activity).
3. Joseph Stalin's (ECONOMIC PROBLEMS OF SOCIALISM IN THE U.S.S.R.)." (Ex. 7, R. 126-127).

The pamphlet laid down proposals dictating the work to be accomplished by Party Chapters (Ex. 7,

R. 127-128). Another urged the membership to "rally to the defense of our Party and around our beloved leaders" (Ex. 8, R. 130) and expressed confidence in the growth of "our Party, its leaders and the working class" (Ex. 8; R. 130). On both of these exhibits received by Mores from the appellant in December 1952 (R. 119-120) he had made the notation, "Received from Al Fisher at Harley Mores, December 26, 1952" (R. 125-126, 128).

On January 17, 1953 (R. 139) appellant attended a Communist Party meeting to evaluate the fruits of the literature distributed by Mores (R. 134). Appellant went to urge the groups to more active Party work and to revitalize lagging membership and collection of dues (R. 137). At this meeting too, he gave Party literature to Mores (R. 138-139, Ex. 9).

A four hour Party meeting was held at Startup, Washington in May 1953, one week before Mores testified at the Seattle Smith Act trial (R. 140-142). The meeting was emblazoned in Mores' mind because he knew at that time that he would appear as a Government witness (R. 140-142). Mazie Mores also recalled this meeting (R. 616). She testified that appellant urged as many people as possible to attend the trial, and that he appealed for funds to support the defense (R. 617). Both Mazie and Harley Mores (R. 618, 142) recalled their apprehension when appellant related that one member, who had formerly collected dues for the Party, would no longer be given

that assignment for fear he would give the proceeds to the Government; and when appellant told of a former Regional Organizer whom he no longer trusted (R. 142). Appellant detailed his concern with the problem of stoolpigeons in this lengthy meeting (R. 142), reflecting a peculiar parallel to the literature he had himself disseminated:

> There have been a few faint and weak-hearted who have dropped by the side of the road and even a few out and out renegades, but our Party is strengthened by the removal of this type of anti-working class element. We shall continue to guard our Party's purity and unity from the ideology of the class enemy. (Ex. 8; R. 129).

SUMMARY OF ARGUMENT

I

The Indictment Was Sufficient

A. The materiality of the false statements charged to have been made was adequately alleged, even though the word "material" was not used in the indictment. That the statements in question were material appears from the allegations made. This is all that was required. In any event, appellant does not even claim to have been prejudiced, and he clearly was not prejudiced.

B. The second and fourth counts of the indictment which allege affiliation adequately state offenses. The term "affiliation" as found in the statute has been upheld as against a challenge that it was unconstitu-

tionally vague. And an indictment containing a count based on affiliation was held to sufficiently advise the accused of the charge pending against him.

C. It was proper to charge two offenses arising out of the filing of each affidavit. It is well settled that one transaction may be the subject of several counts in an indictment. The test of sufficiency is whether each count requires the proof of additional facts. In this indictment different proof is required for each of the counts, and furthermore concurrent sentences were imposed on each count so that if the affiliation counts were found insufficient, the convictions on the membership counts would still be valid and not subject to reversal.

II

The Trial Court Did Not Err in Its Rulings on the Admission of Evidence

A. The testimony of the witness Harper regarding appellant's Communist Party activities before the dates of the affidavits in question was propertly admitted. Evidence of appellant's Party activity before and after the dates in issue was propertly admitted.

B. It was not error to permit the witness Harper to explain his negative answer to a question which required a categorical answer.

III

The Trial Court was Correct in Its Rulings on Excluding Evidence Which Appellant Attempted to Introduce

A. The Court properly ruled that the Government was not required to produce the receipts for compensation paid to the witness Mores by the Federal Bureau of Investigation. The only purpose for the admission of such evidence would have been to impeach the witness by showing interest or bias. Since the Government furnished a certification of the amounts paid, which was introduced in evidence, the receipts would have merely been cumulative, and would not have contained any additional ground for impeachment.

B. The contention of the appellant that the witness Harper had admitted to the prosecutor at his pretrial interview that he had no knowledge of the Communist Party activities of the appellant is without merit. On cross-examination the witness testified that he had given the prosecutor all the information which he testified to at the trial and that he had even told him of additional Party activities of the appellant after the time he testified to, but that he was unwilling to testify to those later events because he could not be specific enough about them. Thus, there was no evidence of any prior inconsistent statement of the witness which would have justified calling the prosecutor as a witness.

C. The ruling, which excluded the testimony of Harper, before a Security Board, at which time it is

alleged he erroneously identified two persons, was proper. This was a collateral matter which had no bearing on any of the substantive issues of this case so that the ruling which excluded such evidence was proper.

IV

The Instructions to the Jury Were Correct

A. The judge properly refused to give the "two-witness" perjury instruction, since this was not a prosecution for perjury, but a prosecution under the "false statements" statute, which does not require that the false statement be under oath to be punishable. Congress' specific mandate that false non-Communist affidavits be prosecuted under the "false statements" statute is clear proof that the "two-witness" rule of perjury cases was not intended to apply in such prosecutions. Furthermore, the gist of the offense in such prosecutions is not the false swearing, but the filing of the false affidavit with the National Labor Relations Board.

B. It was not error for the trial judge to refuse to instruct the jury, in the exact language of the requested instruction, that testimony of witnesses who were in the employ of the Department of Justice or who were paid for their testimony must be examined with "greater scrutiny and care than the testimony of an ordinary witness." *Fletcher v. United States*, 158 F. 2d 321 (C.A.D.C.) does not require that any spe-

cific form of words be included in the instructions in "informer" cases, and, moreover, is clearly distinguishable from this case on its facts. An adequate cautionary instruction was given here. *Hupman v. United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953.

C. The instruction of the Court explaining the meanings of the words "membership" and affiliation" were sufficient. There was no danger that the jury could have been misled, by the cast of the language of the instructions, into thinking that they could convict merely upon a finding of past membership or affiliation as distinguished from membership and affiliation on the date of the affidavits of non-membership. These instructions furnished adequate guidance for the jury in their consideration of the acts and statements of the appellant which would constitute membership and affiliation on the dates in issue.

V

The Trial Court Properly Denied Appellant's Motion for a Judgment of Acquittal, or in the Alternative, for a New Trial

The evidence is sufficient to support the verdict both on the first and third counts, regarding membership in the Communist Party, and on the second and fourth counts, regarding affiliation with the Communist Party.

The issue under all counts was whether appellant falsely denied that he was a member of the Communist

Party and affiliated with the Communist Party when he executed his non-Communist affidavits on June 29, 1951, and July 11, 1952.

A. The Government substantiated the charges raised in the indictment by showing appellant's continued adherence to Communist Party tenets and continued activity with Communist Party programs, as demonstrated by two former members of the Party. Government witnesses Clark Harper and Harley Mores detailed appellant's initial activity in the Communist Party at a District Committee Meeting of the top Party leaders in January 1949. This District Committee Meeting was described as an important occasion commensurate with the Committee's function of interpreting the highest policies of the National Committee of the Communist Party for the membership in the regional organizations.

B. The evidence showed that in 1950 appellant paid membership dues to the Communist Party and was discovered by two Police Officers of the Sumner, Washington area, with approximately 100 pamphlets of Party literature. At the time of this activity, appellant was required to execute an affidavit of non-Communist Union Officer. To reconcile this requirement with his Party duties, appellant sought the advice of a Party functionary who referred him to the higher officers of the Party in Everett, Washington.

C. Government witness Harper described the Communist Party security program during the years

1948 to 1953. He stated that the security measures were designed to meet the problem facing the Communist Party membership in executing the affidavit of a non-Communist Union Officer. Harper's testimony demonstrated that the Party established exclusive "contact" groups, whose relations with other similar cells of the Party, were forbidden.

D. In 1952, appellant renewed his open activity, which had been curtailed by the security program of the Communist Party, when he was appointed to organize the Everett area for the Party and to revive flaging membership subscriptions and dues payments. Subsequent to his appointment, appellant was present at a Communist Party meeting on December 26, 1952, at which time he related his growing role in the Party hierarchy, and gave Party literature to a Communist functionary for distribution to the membership. The literature was used as the basis for future meeting agendas and prescribed a reading list of Communist Party material.

E. Appellant convened a meeting of the Communist Party on January 17, 1953, at which problems of dues and unsatisfactory membership activities were examined. At that time he exhorted the membership to more sustained effort in the Party's behalf and distributed Party literature.

At a meeting in May 1953, appellant urged Party members to active participation in fighting the Seattle Smith Act trial through attendance at the trial and

contribution of funds for the defense. At the same meeting, appellant expressed his growing concern with the problem of those "stoolpigeons" within the Party who were exposing its activities.

The Government submits that the uncontradicted evidence presented in the Court below details an irrefutable record of appellant's dedicated activity between January 1, 1949, and May 17, 1953. The open manifestations of such Party activities were diminished only when, pursuant to the edict of the Communist Party, the appellant went underground.

ARGUMENT

I

The Indictment Was Sufficient

Appellant contends that the indictment failed to set out the essentials of the offense charged and that it failed to set forth with sufficient precision and clarity the time, place and manner in which the offenses were committed and that it was so vague and indefinite that he was unable to prepare a proper defense.

An information or indictment is sufficient to meet modern requirements if it alleges basic facts covering the essential elements of a crime against the United States with enough particularity to apprise the defendant of the nature of the charge and to enable him to protect himself from a subsequent prosecution for the same offense. *Hagner v. United States*, 285 U.S. 427,

431; *Todorow v. United States*, 173 F. 2d 439, 447 (C.A. 9), certiorari denied 337 U.S. 925.

(a) *Materiality Was Adequately Alleged*

It is to be noted that appellant does not go so far as to question or deny the materiality of the false statements charged, since they were manifestly material. Nor does he claim to have been prejudiced in any way by the alleged failure of the indictment to cover materiality, and indeed it is plain that the alleged deficiency could not have prejudiced his defense in any manner. But in any event, the indictment was not even technically deficient in the respect claimed.

Assuming, *arguendo*, that appellant is correct in his contention that the statements must be material to the inquiry, this indictment sufficiently alleged materiality. The case of *Rolland v. United States*, 200 F. 2d 678 (C.A. 5), certiorari denied 345 U.S. 964, on which appellant relies, merely states that an indictment charging a violation of this section must allege that the false statements charged were material or allege facts from which their materiality may be shown. The indictment in this case clearly conformed to this rule. While the word "material" was not used in the indictment, it is not correct to say, as does appellant (A. 21), that it "does not allege that the statements were material. Nor does it state facts to show their materiality." The materiality of the false statements which appellant was accused of having made was charged in substance by virtue of the fol-

lowing allegations (A. 69-73): that appellant "in a matter within the jurisdiction of the National Labor Relations Board, did unlawfully, wilfully and knowingly use and file," two false writings and documents, namely 'affidavit of Non-Communist Union Officers' (Form NLRB-1080), knowing the same to contain false statements and representations, to-wit: that appellant was not then and there a member of the Communist Party" (Counts 1 and 3) and "that he was not then and there affiliated with the Communist Party" (Counts 2 and 4), and that appellant knew these statements to be false when he made them.

In the case of *Hupman v. United States*, 219 F. 2d 243, (C.A. 6), certiorari denied 349 U.S. 953, in which an indictment almost identical with the indictment[4] in this case was filed, this same point was raised on appeal. The Court of Appeals said at page 248:

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[4] The indictment in the *Hupman* case was as follows:

"Count One

"That on or about December 15, 1949, in the Southern District of Ohio, Western Division, Everest Melvin Hupman aka Melvin E. Hupman, the defendant herein, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, willfully, and knowingly in an 'Affidavit of Non-Communist Union Officer' (Form NLRB-1081) make a false, fictitious and fraudulent statement and representation, to-wit, that he was not a member ofthe Communist Party when in truth and fact the said Everest Melvin Hupman, aka Melvin E. Hupman, then and there well knew such statement to be false, fictitious and fraudulent as he

> Equally lacking in persuasion is the complaint that the indictment was insufficient because of its failure to charge that the false statement was material or that the statement was made in a matter within the jurisdiction of the United States. Both affidavit and indictment, in effect proclaim materiality and jurisdiction. The appellant clearly was advised of the charge he had to meet and with specific identity to preclude the danger of double jeopardy.

The same point was again raised by the petitioner in the petition for certiorari.

It has been held, however, that an analysis of 18

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then and there well knew he was a member of the Communist Party.

"Count Two

"That on or about December 15, 1949, in the Southern District of Ohio, Western Division, Everest Melvin Hupman, aka Melvin E. Hupman, the defendant herein, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, willfully, and knowingly in an 'Affidavit of Non-Communist Union Officer' (Form NLRB-1081 make a false, fictitious and fraudulent statement and representation, to-wit, that he was not affiliated with the Communist Party when in truth and fact the said Everest Melvin Hupman, aka Melvin E. Hupman, then and there well knew such statement to be false, fictitious and fraudulent as he then and there well knew he was affiliated with the Communist Party.

"A True Bill.

"Ray J. O'Donnell
"United States Attorney
"Wm. R. Wilson, Foreman"

U.S.C. 1001 reveals that the false statements and documents clause, unlike the concealment clause, does not require that the misrepresented facts be material. *United States v. Lange*, 128 F. Supp. 797 (D.C. S.D. N.Y.); *United States v. Varano*, 113 F. Supp. 867 (D.C. M.D. Pa.). Thus, the indictment was in the language of the statute, and clearly apprised the defendant of the charges against him. *Potter v. United States*, 155 U.S. 438, 444; *Ledbetter v. United States*, 170 U.S. 606, 609-610.

In *Kay v. United States*, 303 U.S. 1, which involved a prosecution under a similar false statements statute, the Court said, at pages 5-6:

> It does not lie with one knowingly making false statements with intent to mislead officials of the [Government] to say that the statments were not influential or the information not important.

For all these reasons, we submit the indictment made adequate allegations of materiality and there was no necessity to allege in *haec verba* that the statements were material.

(b) *Counts Two and Four Are Sufficient*

Appellant contends that the second and fourth counts of the indictment are defective in that the term "affiliation" is so vague, uncertain and indefinite that no intelligible standard of conduct is prescribed and no notice of the offense charged is given.

The affidavit provisions were considered in the case of *Inland Steel Company v. National Labor Re-*

lations Board, 170 F. 2d 247 (C.A. 7), affirmed 339 U.S. 382. In that case the Court said at pages 266-267:

> The point is made that the section [159(h)] is invalid because the phrase 'any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods', 'affiliated with' and the word 'supports' are vague and indefinite and must fall before the First, Fourth and Fifth Amendments. For the reasons set forth in *National Maritime Union v. Herzog, supra,* I think the contention lacks merit * * * *Moreover, the language is not so vague that men of common intelligence would have to guess its meaning and differ as to its application.* It requires only that persons who knowingly engage in the activities set forth in § 9(h) or who knowingly believe in the enumerated doctrines, or who knowingly support organizations which disseminate such doctrines shall not obtain access to the machinery set up by Congress for the purpose of advancing a specific public policy; hence if an affiant honestly believes that he is not affiliated with the Communist Party, that he does not support any organization which to his knowledge teaches the overthrow of the United States Government * * * such an affiant would be in no danger of conviction under * * * 18 U.S.C.A. 1001. [Emphasis supplied]

In *American Communications Association v. Douds*, 339 U.S. 382, which affirmed the *Inland Steel Co. v. National Labor Relations Board* decision, *supra*, Chief Justice Vinson, speaking for the Court on the question of the constitutionality of the affidavit requirement, stated at pages 412-413:

> The only criminal punishment specified [in Section 159(h)] is the application of § 35A of the

> Criminal Code, 18 U.S.C., Section 1001, which covers only those false statements made 'knowingly and wilfully'. The question in any criminal prosecution involving a noncommunist affidavit must, therefore, be whether the affiant acted in good faith or knowingly lied concerning his affiliations, beliefs, support of organizations, etc, * * * And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable. As this court pointed out in *United States v. Ragen*, 314 U.S. 513: 'A mind intent upon wilful evasion is inconsistent with surprised innocence' * * * Without considering, therefore, whether in other circumstances, the words used in § 9(h) would render a statute unconstitutionally vague and indefinite, we think that the fact that under § 35A of the Criminal Code, no honest, untainted interpretation of those words is punishable removes the possibility of constitutional infirmity.

If the provisions of Section 159(h) are not unconstitutionally vague insofar as they call for the filing of an affidavit which employs the words membership, affiliation and support, as the cases above have held, neither then is an indictment alleging a false statement which employs the language of the statute.

In the *Hupman* case, *supra*, p. 26, the appellant raised the identical point, both in the Court of Appeals and in his petition for certiorari. The Court of Appeals for the Sixth Circuit said, at page 245:

> In respect to the sufficiency of the indictment, it has been repeatedly held, as in the *Behrman* case, supra, 'It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in lieu of further prosecution for the same offense.' The indictment, in the present case, was thoroughly considered by Judge Martin of this court when sitting, by designation, in the District Court, he denied a motion to dismiss it for failure to state an offense. With his well considered review developed in his memorandum opinion of January 29, 1953, we are in full accord.

Thus, the contention of appellant that the term "affiliation" is vague and does not inform him sufficiently of the charge has been disposed of by the rulings of the courts, which have upheld the constitutionality of the statute and the validity of an indictment substantially similar to the subject indictment (see footnote 4, p. 26).

(c) *Membership and Affiliation Are Properly Charged In Separate Counts*

Appellant argues that since it is the filing of the affidavits containing the false statements which constitutes the offense, it was improper to charge each false statement in a separate count of the indictment.

It is well settled that one transaction may be the subject of more than one count in an indictment. *Frederick v. United States*, 163 F. 2d 536, 546 (C.A. 9), certiorari denied 332 U.S. 775. As the Supreme Court

said in *Dealy v. United States*, 152 U.S. 539, 542:

> It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offences are intended to be charged, or because the pleader, having in mind but a single offense, varies the statement in the several counts as to the manner or means of its commission in order to avoid at the trial an acquittal by reason of any unforseen lack of harmony between the allegations and the proofs * * * Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offence, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count.

In determining whether separate counts of an indictment constitute the same offense, the test to be applied is whether each count requires proof of additional facts or evidence. *Normandale v. United States*, 201 F. 2d 463, 464 (C.A. 5), certiorari denied 345 U.S. 999. According to that test there is no duplicity in this indictment, as proof of membership in an organization requires different evidence than proof of affiliation with that same organization would require.

This Court is the case of *Berg v. United States*, 176 F. 2d 122 (C.A. 9), certiorari denied 338 U.S. 876, when reviewing an indictment which contained several counts each of which charged the making of a false entry in a report filed with the Interstate Commerce Commission stated, at pages 125-126:

> The falsification of the several entries was punishable in each instance as a separate crime. Each entry required proof of additional facts, in order

> to establish the separate crime, whether made on the same report or different reports. * * *

In the case of *Seymour v. United States*, 77 F. 2d 577 (C.A. 8), there was an appeal from a conviction for perjury committed before a Senate Subcommittee. The multi-count indictment refers to individual matters of inquiry during the course of the defendant's interrogation. It was the contention of the defense that the indictment should have contained only one count and that such count should have embraced all of the questions and answers assigned. The Court of Appeals rejected the argument stating at page 581:

> This contention is not well grounded. The matter covered by the indictment related to various alleged false statements in answer to questions concerning different matters * * * Thus it appears that the statements covered by the several counts referred to different matters of inquiry. Neither the circumstances that all referred to the same general subject of inquiry or that all were made at the same hearing prevents each from being a separate and distinct crime punishable as such. The commission of perjury as to one matter does not absolve the witness or afford him immunity as to all other matters covered by his testimony at the same hearing.

The present indictment charges the defendant with making four distinct false statements. The fact that the false statements referred to in Counts I and II were contained in one affidavit and those in Counts III and IV were contained in another is not material

to a determination as to whether the four Counts of the indictment charge an identical offense in four different matters. The sole determining factor is that the statements dealing with membership and affiliation are different subject matters. Indeed, had the Government contracted each into a single count it could very properly be argued that such a count was duplicatious. An indictment drawn in that fashion would unquestionably be prejudicial and would lead only to confusion.

There is ample precedent for this treatment of plural counts. In criminal cases involving perjury and contempt of Congress, the courts have long recognized that several answers, or refusals to answer constitute separate and distinct offenses for the purpose of pleading and trial. However, as they were simultaneous and directed to one subject of inquiry they could give rise to only a single offense for the purpose of punishment. *United States v. Orman*, 207 F. 2d 148 (C.A. 3); *United States v. Yukio Abe*. 95 F. Supp. 991 (D.C. Hawaii).

As this court said in *Barnes v. United States*, 142 F. 2d 648, (C.A. 9), at page 650:

> It is permissible to allege the commission of an offense in several separate counts, * * * but if proof of guilt under each count rests upon the same facts it is error to impose separate sentences or fines for each count.

It is submitted that in the instant case there was no departure from that rule as different facts were

necessary to prove each of the counts. However, if it were held that the same facts proved membership and affiliation it is submitted that there was no error, as the trial court imposed sentences on each count to run concurrently (A. 3). Consequently, even if it were found that it was erroneous to charge that each of the false statements constituted a separate offense, the appellant would not be entitled to prevail on this appeal as the membership counts and the convictions on those counts would still be valid, and error relating to only one of the counts would not warrant reversal. *Brooks v. United States*, 267 U.S. 432, 441; *Hirabayashi v. United States*, 320 U.S. 81, 85, 105; *Pinkerton v. United States*, 328 U.S. 640, 641-642 fn. 1. It is submitted that there was no error affecting either count.

II

The Trial Court Ruled Correctly on the Admission of Evidence

A. Appellant contends that the trial court erred in admitting the testimony of the Government witness Harper which it contends was irrelevant in that the direct testimony of Harper as to appellant's attendance at Communist Party meetings was limited to a period before the execution of the non-Communist affidavits; and the explanation which the court permitted Harper to give in answer to the question, whether or not he had seen the appellant at any Communist Party meetings after January 1, 1949. Appellant apparently

believes that since the fact in issue was his membership and affiliation on the dates on which the affidavits in question were signed, it was improper to admit evidence of his Communist Party activities before that date. This contention is without merit.

The statutory requirement (29 U.S.C. 159(h)) of an oath of non-membership in the Communist Party, which is a prerequisite to the utilization of the processes of the National Labor Relations Board, can be satisfied only by an affidavit drafted in the present tense:

> * * * that he *is not* a member of the Communist Party * * *. [Emphasis supplied]

It was the Government's contention at the trial that appellant was a member of the Communist Party on July 29, 1951, and July 11, 1952, and that consequently his affidavits of those dates stating that he was not then a member were false. To convince the jury of this, the Government was required to adduce either direct evidence of appellant's membership on those specific dates or evidence of overt acts and facts occurring both before and after those dates which would warrant the jury in concluding beyond a doubt that he was a member of the Party on those dates. The Government presented a case of the latter sort. The evidence it adduced, if accepted by the jury as true, impelled the conclusion that appellant falsely stated that he was not a member of the Communist Party on the crucial dates.

The authorities cited by appellant (A 32) do not support his contention that the witness Harper's testimony of his membership before the dates in issue was erroneously received. In some of the cases cited (*e.g., Wolf v. United States,* 259 Fed. 388 (C.A. 8); *Kammann v. United States,* 259 Fed. 192 (C.A. 7); *Dalton v. United States,* 154 Fed. 461 (C.A. 7); *State v. Wenzel,* 72 N.H. 396, 56 A. 918; *Pooley v. Dutton,* 147 N.W. 154), the ruling of inadmissibility was based on the ground that the evidence in question did not have probative value on the issue with respect to which it was admitted.

In *Haupt v. United States,* 330 U.S. 631, 642, it was held that evidence of conversations and occurrences long before the indictment which consisted of statements indicating sympathy with Hitler and Nazi Germany and hostility to the United States, were propperly admitted in a treason prosecution in order to show intent.

The Court of Appeals for the Second Circuit in *United States v. Dennis,* 183 F. 2d 201 (C.A. 2), affirmed, 341 U.S. 494, in holding that statements which defendants made before the acts charged became a crime and before the period of the alleged conspiracy were competent and relevant, said, at page 231:

> * * * but it is nonsense to say that events occurring before a crime, can have no relevance to the conclusion that the crime was committed; and declarations are no different from any other evidence. How far back of the commission of the

crime one may go is a matter of degree, and within the general control of the judge over the relevancy of evidence. In the case at bar, there is not the least reason to hold that his discretion was abused. The same doctrine applies to evidence occurring before the acts charged had become a crime at all: e.g., in the case at bar the visits of some of the defendants to Moscow before 1940. Just as in the case of events occurring before the dates laid in the indictment, so events occurring before the conspiracy had become a crime, may have logical relevance to the conclusion that the conspiracy continued until after 1940. It is toto coelo a different question whether we are treating them as media concludendi, or as the factum itself. *Kammann v. United States*, 7 Cir., 259 F. 192, is not the contrary; the declarations of the accused before we were at war were extremely remote to prove his intent after we entered the war. There might indeed be a faint bias for supposing that one who sided with the Germans while we were neutral, would still side with them after we were enemies; but it was not surprising that the appellate court thought the inference too feeble to be within the trial court's discretion. However, in *Wolf v. United States*, 8 Cir., 259 F. 388, 393, although the report leaves it uncertain, apparently the declarations were made after we entered the war, and yet they were held to be improperly admitted; and in *Haywood v. United States*, 7 Cir., 268 F. 795, 806, there is a dictum to the same effect. We are not in accord with this reasoning; and it follows that we regard the admission of evidence of what any of the defendants did before the Smith Act was passed as competent and relevant. Indeed, it would have been equally so, had its use not been confined, as it was, to the individual defendants concerned: that is, it would have been had the judge concluded, as well as he might, that already all

> the defendants were engaged in the same enterprise that was charged against them in the indictment. The only question that could arise was whether the interlude of the Communist Political Association between May, 1944 and July, 1945, made what was done earlier too remote rationally. Clearly the interlude did not do so. We hold that all the declarations were competent and relevant.

B. The appellant also contends that it was error for the trial court to permit the witness Harper to explain his answer to the following question (R. 412):

> And had you seen him at Communist Party meetings after that date?

It has been held that the trial judge has discretion in ruling upon whether a witness may be permitted to explain an answer. *United States v. Stoehr*, 100 F. Supp. 143, 154 (D.C. M.D. Pa.), affirmed, 196 F. 2d 276, certiorari denied, 344 U.S. 826; *United States v. Graham*, 102 F. 2d 436, 441 (C.A. 2), certiorari denied, 307 U.S. 643. And a witness is ordinarily permitted to explain his answer where the question calls for a categorical answer. *Webber v. Auto Park Transportation Co.*, 138 Wash. 325, 244 P. 718, 719 (1926).

In this instance, since the question was one which called for a categorical answer, it was proper for the trial court to permit the witness to qualify his negative answer to the question. As it developed, the witness explained the Party security measures which were in effect at that time and also the possibility of his having

seen Mr. Fisher at a subsequent District Committee convention (R. 410-411). On cross-examination the witness Harper further explained this answer by testifying that at his pretrial interview he advised the prosecutor that while he had seen the appellant at other subsequent meetings, he was unwilling to testify regarding these occasions as he could not be specific enough about them (R. 566).

For these reasons, it is submitted that the trial court did not err when it permitted the witness Harper to testify as to appellant's Communist Party activities, and it properly allowed the witness to explain his answer to a question which required a yes or no answer.

III

The Trial Court's Rulings on the Exclusion of Evidence Were Correct

The appellant cites as error three rulings of the trial court which excluded evidence offered by him. The alleged erroneous rulings involved: the refusal of the trial court to compel the Government to produce the records of the Federal Bureau of Investigation dealing with the compensation of the witness Mores; the exclusion of the testimony of the Assistant United States Attorney, who presented the case, when appellant attempted to call him as a witness to show prior inconsistent statements by the witness Harper; the exclusion of testimony of the witness Harper in another proceeding having no connection with this case.

A. *The Receipts for Payments to the Witness Mores Were Properly Excluded*

Appellant contends (A. 36-40) that the trial court erred when it did not compel the Government to produce the receipts of payments made to the witness Harley Mores while he was posing as a Communist Party member from 1942 to 1953.

The witness Mores had on direct examination estimated the total amount he had been paid was about $10,000. On cross-examination when the witness said that he had no way of checking the amount, appellant demanded that the receipts of the payments made to him by the Federal Bureau of Investigation be produced (R. 326). The Government then offered to stipulate that the amount was $10,000 but this stipulation was rejected by appellant (R. 328). The Court ruled that there was not a sufficient showing for the production of the receipts, but that the total amount of compensation was material and should be furnished (R. 338). In response to this ruling the Government announced that the Federal Bureau of Investigation had reported the total amount paid to the witness was $10,530 (R. 365). In the later stages of the trial a certification prepared by the Federal Bureau of Investigation, showing the sums received by the witness, was furnished the appellant, this was later admitted into evidence (R. 749; Ex. 10).

Facts tending to show interest or bias on the part of a witness may be elicited on cross-examination, *Ma-*

jestic v. Louisville & Nashville R. R. Co., 147 F. 2d 621, 627 (C.A. 6); and ordinarily, evidence that a witness is employed by a party to the action is admissible to show bias or interest, *Sprinkle v. Davis*, 11 F. 2d 925, 931 (C.A. 4), certiorari denied, 314 U.S. 647. While employment of a witness may be considered on the point of his credibility, it is not of itself a sufficient reason for disregarding his testimony. *Arnall Mills v. Smallwood*, 68 F. 2d 57, 59 (C.A. 5); *Wabash Screen Door Co. v. Black*, 126 Fed. 721, 726 (C.A. 6).

The appellant on this basis then was entitled to elicit from the witness Mores the information of his employment by the Government and the amount of his compensation. In this attempt he received the estimate of the witness as to the amount and a certification of the amount by the Government. It is to be noted that the witness' estimate was within $500 of the actual amount paid, not a sufficient difference to constitute contradictory testimony.

Since the appellant was afforded an unrestricted opportunity to bring the fact of the witness' employment and the amount of his compensation, certified to the penny, before the jury, it is submitted that his right to show bias or interest on the part of the witness was in no way curtailed. The payment records of the Bureau could not have thrown any further light on the subject of the bias or interest of the witness, therefore, the refusal of the court to order their pro-

duction was not prejudicial to the rights of the appellant.

B. *The Trial Court Properly Refused to Allow Appellant to Call the Prosecutor as a Witness*

Another contention of the appellant is that the trial court erred when it did not permit him to call the prosecutor as a witness. There is no merit to this contention.

After the Government had rested and appellant's motion for a judgment of acquittal had been denied, appellant advised the court of his intention to call the prosecutor as a witness (R. 691). It was contended that his testimony would bear upon the credibility of the witness Harper by showing a statement to the prosecutor at the time of the pre-trial interview that he had no knowledge of appellant's Communist Party activities.

The prosecutor, during the direct examination of the witness Harper, at a bench conference in which he was advancing his reasons for permitting the witness to testify regarding Communist Party security policy, stated (R. 385):

> I think it is important for this reason: that during this period — to show that one Communist Party member did not meet with too many others as previously for the reason — *showing that possibly it might be adduced here that the only witness showing Mr. Fisher's implication in the case is Harley Mores.* I direct these and wish to establish that the security measures were taken

> where there was only, maybe, two or three persons that knew or met together during this time who were in the Party so that if you were left with a situation, like maybe here, where you would have the Defendant, Harley Mores, and maybe only one or two others, that they would know that the Defendant was in the Party at the time. [Emphasis supplied.]

Appellant wrenched the italicized words from their context and has attempted to construe them as an admission by the prosecutor that the witness Harper had no knowledge of the Communist Party activities of the appellant. While relying on his interpretation of this particle of the prosecutor's statement as an admission that Mores was the only witness who could implicate appellant as a Communist Party member, appellant conveniently ignores the testimony of the witness Harper on cross-examination (R. 564-567). There the witness testified that he had been interviewed by the prosecutor one week before the trial (R. 564); that at this interview he had been asked the same question as at the trial and had given the same answers (R. 565); that he told the prosecutor of having seen appellant at the January 1, 1949 meeting and that he told of having seen him at other subsequent meetings, but that he would only testify to the January 1, 1949 meeting as that was the only one he absolutely remembered (R. 565-566).

Thus the contention of appellant that Mores was the only witness who could implicate him with the

Party was demolished by the testimony of Harper on cross-examination.

If the trial court had acceded to the demands of appellant and permitted him to call the prosecutor as a witness and interrogate him with regard to the testimony of Harper, the only evidence which could have been adduced would have corroborated the cross-examination testimony of Harper, as there was no evidence of any prior inconsistent statement by the witness Harper.

C. *The Limitation on the Cross-examination of the Witness Harper Was Not an Abuse of Discretion by the Trial Court*

Appellant also cites as error the ruling of the trial court which refused to permit appellant to cross-examine the witness Harper with respect to an alleged mistaken identification at another proceeding.

During the cross-examination of Harper appellant questioned him with respect to a prior Security Board hearing and then asked about his alleged mistaken identification. The prosecutor objected to this question (R. 514). This objection was sustained by the court (R. 515). After the jury had been dismissed appellant made an offer of proof that the questions would show that the witness had made a false identification at a Security Board hearing when he was attempting to identify a person as having attended Communist Party meetings (R. 518-522). Appellant stated that this subject was a proper one since it had a bear-

ing upon the witness' ability to identify the appellant and would also tend to impeach him (R. 478). The Court stated that to permit cross-examination on this subject would bring in a collateral issue which would tend to confuse the main issues of the case (R. 487).

While it is difficult to ascertain the basic theory on which appellant was proceeding in his attempt to impeach Harper the closest of the recognized grounds of impeachment appears to be prior inconsistent statements. But as this Court held in *Shanahan v. Southern Pacific Co.*, 188 F. 2d 564 (C.A. 9), a witness may not be impeached by contradiction on a collateral matter. It has long been established that the self-contradiction of a witness by prior inconsistent statements may be shown only on a matter material to the substantive issues of the case. *Cwach v. United States*, 212 F. 2d 520, 530 (C.A. 8).

It is evident that in this instance the proffered evidence was not logically relevant to establish any material fact in this case. Even if the witness had been mistaken in identifying another person it had no bearing upon his testimony regarding appellant's Communist Party activities.

While collateral matters may be gone into on cross-examination to a limited extent for the purpose of testing the credibility of a witness, *United States v. Lawinski*, 195 F. 2d 1, 7 (C.A. 7), the scope of such examination is within the discretion of the trial court. *United States v. Augustine*, 189 F. 2d 587, 590 (C.A.

3). Unless such discretion is abused there can be no reversal. *Wright v. United States*, 183 F. 2d 821, 822 (C.A. D.C.).

It is submitted that there was no abuse of discretion in the ruling of the trial court in this instance.

IV

THE INSTRUCTIONS TO THE JURY WERE CORRECT

It is contend by the appellant that the trial judge erred in his instructions to the jury with respect to three matters, which he has listed under headings, A through C (A. 44-59). The alleged error referred to under heading A was the refusal of the Court to instruct the jury that the proof required for a perjury conviction was required in order to convict appellant in this case, and also that the Court's instruction that appellant could be convicted on circumstantial evidence was erroneous. Under heading B appellant argues that the Court did not properly instruct the jury on the weight to be accorded the testimony of Government witnesses who were former members of the Communist Party, and who were being paid by the Government while testifying. Under heading C he contends that the Court erred in its instructions on the definitions of "membership" and "affiliation" and in refusing to give the instructions proposed by appellant on these points.

A. *The Refusal to Give the "Two Witness" Perjury Instruction—*

> Appellant contends (A. 44-50) that it was error for the trial judge to refuse to instruct the jury that you cannot find the defendant guilty if the proof of falsity of the affidavit is merely circumstantial.
>
> * * *
>
> As I have instructed you the plaintiff, government, must establish the falsity of the statements alleged to have been made by the defendant under oath by the testimony of two independent witnesses or by the testimony of one witness and corroborating circumstances * * *. (A. 45).

This contention is without merit, as the requested instruction had no applicability to this case.

It is to be noted that 29 U.S.C. 159(h), in accordance with which the affidavit in this case was filed, specifically provides that "The provisions of section 35A of the Criminal Code [now broken up into a number of sections, of which 18 U.S.C. 1001 is one] shall be applicable in respect to such affidavits." Since 18 U.S.C. 1001 is not a perjury statute, the fact that Congress declared that the filing of false affidavits should be punished as provided in 18 U.S.C. 1001 is clear proof that the "two witness" rule of perjury cases was not intended to apply to prosecutions brought thereunder.

Furthermore, it is not the false *swearing* but the *filing* with the National Labor Relations Board of a false affidavit which constitutes the offense defined

by 18 U.S.C. 1001 read in the light of 29 U.S.C. 159(h); *United States v. Valenti*, 207 F. 2d 242 (C.A. 3). Hence, even where a false non-Communist affidavit is executed, no offense under those sections is committed unless and until the affidavit is filed with the Board. (Id. at 244). For this reason the indictment in this case was careful to charge that appellant "did * * *, use and file * * * with said Board a false writing and document, namely," etc.

It is submitted that the Trial Court properly instructed the jury that a conviction could be based on circumstantial evidence alone. In the *Hupman* case, *supra*, a case in which the defendant was indicted for false statements on a Taft-Hartley affidavit, the Court of Appeals for the Fifth Circuit said, at pages 247:

> Circumstantial evidence from which reasonable inferences may be drawn will sustain a verdict [citing cases]. We think the record presents circumstances which warrant a reasonable inference that the appellant signed and either filed, or caused to be filed, the affidavit here involved.

B. *The Instruction on "Informers"*

It is contended by appellant (A. 50-53) that the Trial Court erred in refusing to give his Requested Iustruction No. 5.

The requested instruction was based on the so-called " 'two-witness rule' in perjury cases," that is the "special rule which bars conviction for perjury solely upon the evidence of a single witness." *Weiler v.*

United States, 323 U.S. 606, 608. According to that rule, the Government, in a prosecution for perjury, "must establish the falsity of the statement alleged to have been made under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances" (Id. at 607), and the jury must be so instructed (Id. at 610-611). That the rule is limited to prosecutions for perjury is clear from the Supreme Court's explanation of the rationale behind the rule (Id. at 609):

> Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.
>
> * * * Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath." The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

The instant case was not a prosecution for perjury, which offense is defined and punished by 18 U.S.C. 1621, but a prosecution under the "false statements" statute, 18 U.S.C. 1001. That statute provides for the punishment of—

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry * * *.

The statement need not be under oath to come within the proscription of this statute, though of course, as in this case, it may be one made under oath. Consequently, the "two-witness" rule has no application to prosecutions brought under it. *Todorow v. United States*, *supra*, p. 25.

> The testimony of the witnesses who were at the time of their testimony in the employ of the Department of Justice or who were paid directly for their testimony in this case must be examined with greater scrutiny and care than the testimony of an ordinary witness for the purpose of determining whether such testimony is colored in such a way as to place guilt upon a defendant in furthance of the witnesses' own interest.
> The contention is without merit.

The phraseology of appellant's requested instruction was evidently constructed by combining verbatim two passages from the opinion in *Fletcher v. United States*, 158 F. 2d 321 (C.A.D.C.). That case involved a narcotics conviction in which the sole evidence against the defendant was the testimony of a paid informer-addict. The Court reversed the conviction because, as it held, at page 321:

> * * * the trial court erred in refusing a requested instruction to the effect that the informer's testimony *should be examined by the jury with greater*

> *scrutiny and care than the testimony of an ordinary witness.* (Italics supplied)

Later in the opinion occurs the following language; (as will be seen, the italicized portion forms the basis of the latter part of the appellant's requested instruction (Id. at 322)):

> Granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely *for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance* of the witnesses' own interest.
> (Emphasis supplied).

The Fletcher case thus is authority for the proposition that, where the sole evidence against a defendant is the uncorroborated testimony of a paid informer, the jury should be instructed to scrutinize it with care in the light of the possible interest of the informer in aiding the procuring of a conviction. But it is plain from the Fletcher opinion that the Court was not, as appellant seems to believe, laying down any verbal formula for inclusion in the instructions in prosecutions involving the use of informer testimony. That such was not the intent of the Court may be seen also from its subsequent opinion in *Cratty v. United States*, 163 F. 2d 844, 850 (C.A.D.C.). In the instant case, as we shall point out in a moment, a suitable cautionary instruction was given.

Furthermore, the instant case is clearly distinguishable from the *Fletcher* case on its facts. In *Fletcher*, as we have noted, the sole evidence against the defendant was the uncorroborated testimony of a single paid informer. In the case at bar, on the other hand, the Government's evidence included the testimony of three former members of the Communist Party as well as numerous documentary exhibits.

The trial judge, while refusing to give the requested instruction, did give a cautionary instruction. It was as follows (R. 845-846):

> The evidence shows that certain of plaintiff's witnesses were in times past engaged by the government to join the Communist Party and make reports to the Federal Bureau of Investigation of such facts as they learned during such association; and also that they were paid considerable sums of money while so engaged. In weighing the testimony of such witnesses in this case you should scrutinize their testimony with care and caution and after so considering their testimony give it just such weight as you believe it to be entitled to in view of all the circumstances of the case as disclosed by the evidence. If you find they have testified truthfully such testimony is as good as the truth testified to from any other source.

An identical instruction on informers was refused in the *Hupman* case, *supra*, the point was raised in the brief on appeal and the petition for certiorari but was not deemed worthy of consideration by either Court. It is submitted that the foregoing cautionary instruction was clearly adequate and appropriate to the cir-

cumstances of this case. Cf. *Communist Party v. Subversive Activities Control Board,* (decided December 23, 1954; slip opinion pp. 54-55), certiorari granted 349 U.S. 943.

C. *The Instructions of the Court on "Membership" and "Affiliation" Were Correct*

The contention of the appellant that the membership instruction of the Trial Court was so "vague and indefinite as to furnish the jury with no ascertainable standards of guilt" and that the Trial Court failed to give a "comprehensible definition of membership" are without merit. (A. 53-59). The trial judge explained the meaning of membership as follows (R. 853-854):

> As used in the indictment and statute the words "member" and "affiliated" when applied to the Communist Party, have no unusual or different meaning apart from their normal or common usage. Webster's New International Dictionary defines "member" as follows:
>
> > One of the persons composing a society, community, or party; an individual who belongs to an association.
>
> "Affiliate" is defined as follows:
>
> > To connect or associate one's self with; to adopt, hence to bring or receive into close connection; to ally.

The word "member" is a word of common knowledge and when related to an organization has a definite meaning. Membership in an organization is one

of the most common and frequently exercised privileges of an American citizen, and it is doubtful if there is any juror who does not understand the acts which constitute membership in an organization, Communist Party or otherwise. It is unreasonable to argue then, as does appellant, that the individual jurors could not have understood the meaning of the term. The fact that Congress when it enacted the Labor Management Relations Act of 1947 (29 U.S.C. 151 et seq.) did not undertake a definition of the term membership is an indication that the legislators intended to use the word in its ordinary sense. Thus, the recourse by the trial court to a dictionary definition of the word was by no means improper.

If the argument of appellant were carried to its logical conclusion, there would be a duty placed upon the trial court to define with particularity every word used in the statute and indictment, regardless of whether the word was used in its ordinary sense or the clarity of the thought it conveyed. Appellant has cited no authority for so grossly underestimating the intelligence of the ordinary juror.

In the case of *American Communications Association v. Douds*, 339 U.S. 382, the Supreme Court held that Section 9(h) and (Title 29 U.S.C. 159(h)) was not unconstitutionally vague in that the terms, including membership in the Communist Party, were not defined in the statute and therefore did not afford a reasonable standard for determining guilt. In uphold-

ing the constitutionality of this section the Supreme Court stated that "no honest untainted interpretation is punishable" and pointed out that:

> The state of a man's mind must be inferred from the things he says or does * * * false swearing and signing the affidavit must, as in other cases where mental state is in issue; be proved by the outward manifestations of state of mind.

It is precisely the outward manifestations of appellant's state of mind, the relevant acts and statements of appellant as reflected in the trial record, that the court instructed the jury to consider in determining whether appellant was a member of the Communist Party when he signed his 1951 and 1952 affidavits.

V

The Evidence Is Sufficient to Support the Verdict

The Government submits that there is no merit to appellant's contention that judgments of acquittal should have been entered because there is insufficient evidence to support the verdicts of conviction on Counts One, Two, Three and Four (A. 59-68).

Moreover, since concurrent sentences were imposed (A. 3) the judgment of conviction must be affirmed if the evidence establishes a sufficient basis upon which the verdict on any count can be justified. *Brooks v. United States*, 267 U.S. 432, 441; *Hirabayashi v. United States*, 320 U.S. 81, 85, 105; *Pinkerton v. United States*, 328 U.S. 640, 641, 642 fn. 1. The

Government contends that the evidence suffices to support the verdict on each of the four counts.

> "We may say that the evidence is insufficient to sustain the verdict only if we can conclude as a matter of law that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence." *Stoppelli v. United States*, 183 F. 2d 391, 393 (C.A. 9), certiorari denied 340 U.S. 864; *Curley v. United States*, 160 F. 2d 229, 232, (C.A.D.C.), certiorari denied 331 U.S. 837.

As the Supreme Court said in *Glasser v. United States*, 315 U.S. 60, 80: "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." The Government's evidence in this case we submit has fulfilled the required standards of proof on each of the four counts.

The issues at trial, so far as they are now pertinent, are whether appellant falsely denied that he was a member of the Communist Party on the dates of his affidavits of June 29, 1951 and July 11, 1952 (A. 69-71; Counts One and Three), and whether on the same dates he falsely denied that he was affiliated with the Communist Party (A. 69-71; Counts Two and Four). Although the evidence adduced in the lower court is detailed in the Counterstatement of the case, the Government will restate some of the highlights at this point.

The evidence first established that the appellant had attended an Enlarged District Committee Meeting

of Communist Party functionaries on January 1, 1949 (R. 107, 409-410, 435, 439). Two witnesses, Clark Harper and Harley Mores, testified that an Enlarged District Committee Meeting was one of the most closely guarded of organizational sessions, confined exclusively to members of the Communist Party (R. 109, 462), and concerned with topics of top Party policy (R. 375-378, 380). Specifically, the witnesses related that the composition of the meeting, aside from the District Committee members present, was confined to the leadership group in the Communist Party composed of Club Chairmen and Secretaries (R. 377-378). The importance of this particular session on January 1, 1949, was emphasized by the witness Harper, who stated that in his nine years in the Party, as a veteran of over 1000 meetings (R. 359-362, 429), he was unable to recall a single instance when a District Committee meeting had been held on New Year's Day (R. 451, 566). Harper testified that the meeting was held on the occasion of the return of Henry Huff to the Seattle area (R. 375, 409, 439); Harper related that the discussion at the meeting detailed the Party role in forming a picket line that was to be strung about the County Court House in Seattle, to be headed by John Daschbach (R. 409).

Harley Mores testified that in September, 1950, appellant had visited his home in Gold Bar, Washington (R. 110, 112). On that occasion, Mores related, appellant had paid him $12.00 in Party dues and had sought Mores' advice regarding Party policy as it re-

lated to the signing of the Non-Communist affidavit by Party members (R. 111). This inquiry was occasioned by the fact that appellant had recently been elected a member of the Executive Board of IWA Local No. 93 (R. 15, 17, 104-105, 614), and as a member of this Board would now be compelled to execute an affidavit of a Non-Communist Union Officer (R. 22, 28, 50, 51, 57, 70). Mores, reluctant to advise the appellant in this matter, had referred him to the "leadership in Everett" (R. 111, 614, 621). Further justification for appellant's concern with the execution of this affidavit in the face of his Party activities is indicated by his earlier actions on June 30, 1950 (R. 74, 78). In the midnight hours of that date he was found by two officers of the Sumner Police Department (R. 74, 78) beside his car, which at that time was strewn with approximately 100 pamphlets, some bearing the title "Communism", and others covering topics relating to Marx (R. 77-78). When questioned by the officers about his allegiance to the Party at that time, appellant had replied, "Oh no; I just read the stuff." (R. 76). This, in regard to 100 pamphlets of similar content.

That appellant had received the advice from the "leadership in Everett" (R. 111) that he sought, can be fairly inferred from the testimony of Harley Mores and his wife Mazie, that soon after the 1950 meeting appellant absented himself from open Party business and was only seen occasionally in the period 1950 to 1952 (R. 114, 273, 275, 621). That this advice was in

line with the established Party policy at that time was disclosed by the witness Harper from his experience as a member of the policy making District Committee of the Communist Party (R. 373, 375). Harper related that in November, 1948, a new security program had been initiated by the Communist Party (R. 378). This was to meet the new problem posed to its members by the Non-Communist Affidavit of Union Officer required by the recently enacted Labor Management Relations Act of 1947 (R. 569-570). To protect the Party in its gains in labor unions through the recruitment of those in the top labor leader positions, the Communist Party devised a program allowing its membership to be excused from the rigid requirements imposed by the Communist Party Constitution and permitting them to sign the Non-Communist affidavit and to discontiue their attendance at Party meetings (R. 569-570). To implement the new measures the whole fabric of the Communist organization went underground (R. 456). Clubs were instructed to destroy membership cards (R. 133, 387-388, 456, 569-570), to desist from calling Party members by name (R. 462, 569-570), to discontinue the practice of keeping records and books with relation to the collection of dues (R. 133), and to terminate formal Party meetings (R. 569-570). To fill the gap thus opened by the new security procedures, and to keep the membership constant, selected contact persons were appointed to meet in groups of three, while they severed relations with the other groups in the Party and with persons outside

the formal contact unit (R. 456). Even the Party Clubs were cautioned against detailing a list of their membership to other Clubs in the Communist organization (R. 569).

Appellant's compliance with these security measures lasted until a period just prior to December 26, 1952, when the witness Mores testified that he had met appellant at the home of a Party leader in Everett (R. 121). This meeting related to appellant's selection as the new functionary in the Communist hierarchy, designated to organize the area near Everett and charged with the receipt of dues from such couriers as Mores (R. 122).

The new role was exercised a short time later, at a meeting on December 26, 1952, wherein witness Mores testified, nothing but Communist Party matter was discussed (R. 115). At this meeting, appellant told Mores that in line with appellant's greater responsibilities in the area he had decided to organize "the woods, the Sultan local" 93 of the International Woodworkers of America (R. 116). This was a signal event for still another action by the appellant, for it was on this occasion that he supplied the witness Mores with Party literature for distribution to members in the outlying areas for their perusal with regard to future Party agendas (R. 117-118; Ex. 7). The literature detailed not only the specific points of order that were to be accomplished by each Party cell, but listed prescribed Party literature, ranging from Elmer Lar-

sen's article in the Political Affairs issue of October, 1952, entitled "On Guard Against Enemy Infiltration" to Malenkov's "Report to the 19th Congress, Section on the Party" and Foster's "History of the Communist Party, USA" (R. 126-127; Ex. 7). That appellant realized that this distribution of literature was more than a normal invocation of the privileges of freedom of speech and dissemination of printed matter, is intimated by his instruction to Mores that he was "just not [to] lay them around where anyone could pick them up" (R. 138; Ex. 7, 8). On that occasion, Mores stated, he had no alternative but to obey appellant's instructions because, "That was the jobs of such guys as Fisher" and he had to do as he was told or be expelled from the Party (R. 324).

Two weeks later, on January 17, 1953, appellant attended a Communist Party meeting in order to evaluate the work that had been accomplished in line with the suggestions detailed in the literature he had given to Mores for distribution (R. 134, 137). At the January 17 meeting appellant urged the group to more active work for the Party in his effort to revitalize their flagging membership program and the collection of dues (R. 137-140). At this meeting too, he gave Party literature to Mores (R. 138; Ex. 9).

The evidence also disclosed that one week before Mores testified in the Seattle Smith Act trial in 1953, appellant was present at a four-hour Party meeting held near Startup, Washington (R. 140-141). At this

meeting appellant urged the membership to attend the trial "and make a showing", and to contribute funds for the support of the defense (R. 617). But the meeting remained emblazoned in Mores' mind because on this eve of Mores' testimony for the Government, appellant detailed to the group his growing concern with the problem of "stool pigeons" in the organizataion. He intimated in his new role of importance that one member who had formerly collected dues for the Party would no longer be given that assignment for fear he would turn the proceeds over to the Government; and that a former Regional Organizer was no longer to be trusted (R. 142, 617-618).

The evidence in this case is overwhelming that appellant was continuously a member of the Communist Party and affiliated with the Party in the years ranging from January, 1949 to May of 1953. There is substantial evidence to warrant a jury's finding he continued as a member of the Party and was affiliated with the Party on June 29, 1951 and July 11, 1952, the periods covered in the indictment. We submit that the evidence is sufficient to support the verdict of guilty on Counts One, Two, Three and Four.

Appellant disparages the testimony of the witness Harley Mores as completely vague and indefinite on the material points at issue. He states that Mores was completely unable to relate the dates which were relevant to the indictment (A. 63); and he tortures the record in citing the isolated instance where Mores

offers his conclusion that appellant was a member of the Communist Party (A. 63). But appellant ignores Mores' uncontroverted testimony detailing times, places and events in the face of concerted cross-examination lasting almost four hours. He ignores the meeting with a Party leader in 1952 at which appellant was present and appellant was given the reins of the Party organization in the Everett area. He ignores the December 26 meeting of 1952, and the content of the literature and instructions that appellant had given to Mores on that occasion for distribution to the membership. He omits the conversations relating to dues and collection of monies for the Party in the two 1952 instances where he met with members of the Communist Party.

Appellant disparages Mores' reply to a question that he had ever received literature from the defendant (A. 64), but never meets the fact of Government exhibits 7 and 8 and their notation, "Received from Al Fisher at Harley Mores, December 26, 1952" (R. 125-126, 128), nor Mores' statement, "* * * from that time on I received my literature directly from Al Fisher" (R. 118).

Appellant distorts the importance of the meeting appellant attended in May, 1953, as only relevant on the issue of whether appellant signed a false affidavit on June 5, 1953 (A. 67). He neglects to estimate the bearing this has on highlighting the line of appellant's Party activity running from Janury, 1949

through to 1953, covering the full period of the indictment at issue in the present instance, and providing the reasonable inference that appellant's activity at this time was both continuous and important. Appellant further criticized the characterization of meetings appellant attended (A. 63-67) as opinions of the witness Mores, but never meets the issue posed by the testimony relating to the topics covered at such meetings, their purposes, or the loyalties of the individuals who participated.

Appellant refers to the record of the argument of counsel on motion for a directed verdict of not guilty (A. 62) and his dissertation quotes at great length from Congressional hearings wherein the point was made that Section 9(h) calls only for denial of present membership in the Communist Party. While there is no dispute as to this proposition, even a cursory perusal of this argument reveals a studied effort to confuse the question of substantive law with the requirements of the rules of evidence.

Appellant's reliance on the *Douds* case (A. 60) *(American Communications Assn. v. Douds*, 339 U.S. 382) is also an attempt to confuse a question of substantive law with the evidentiary problems involved in proving a criminal offense. The *Douds* case held that Section 9(h) is constitutional because it is limited to a denial of present membership and, hence, is not objectionable as a Bill of Attainder. The question of whether membership as of a given date may be determined

on the basis of membership prior and subsequent to the date presents an entirely different issue and is simply the question whether the evidence presented rises to that quantum necessary, as a matter of law, to permit the case to go to a jury. The Government is not relying upon evidence of prior membership alone but is relying on the total of the evidence as to appellant's Communist Party membership, both prior and subsequent to the execution of the affidavits. Appellant's position that such constant and consistent behavior is not probative of appellant's status and intent when he filed the affidavit is exposed by its statement alone.

Appellant's contentions with regard to "memberships" and the questions of the crime of perjury as they relate to this case are discussed in Point IV of the Government's brief.

Appellant's argument as to the sufficiency of the evidence is an elaborate and specious intellectual exercise which concerns itself largely with factual issues already resolved by the verdict of the jury.

Bearing in mind that the Government is relying not only upon the evidence of pre-affidavit membership and affiliation, but upon the basis of post-affidavit membership and affiliation as well, the question is one as to the weight of the evidence, a matter normally within the province of the jury. *Hupman v. United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953.

Unless it can be said that the facts presented were too remote and inconsequential to constitute a prima facie case, the fact issues in this proceeding were properly submitted to the jury. It is urged that the Trial Court was clearly warranted in submitting the question of appellant's guilt or innocence to the jury, and further that the quantum of uncontradicted evidence is sufficient to sustain the verdict on all counts.

CONCLUSION

The appellee respectfully submits that the appellant was not prejudiced by any occurrence at the trial and that he was convicted on substantial evidence. Hence the verdict of the jury and the judgment of the court below should be sustained.

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